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NO. _____.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GERARDO ADOLF VILLARREAL,
a/k/a Jerry

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in refusing to consider Petitioner's assignment of error complaining of the trial court's failure to define the term "accomplice" when the court charged the jury on "alleged"

accomplice testimony, and when Petitioner timely requested the legal definition and the trial court refused to submit ANY definition.

2. Whether the Court of Appeals erred in holding that the trial court did not err in refusing Petitioner's requested charge that the jury could acquit the Petitioner on the uncorroborated testimony of an "alleged" accomplice, and when the trial court charged the jury they could convict the Petitioner on the uncorroborated testimony of an "alleged" accomplice, and when the "alleged" accomplice gave exculpatory testimony beneficial to the Petitioner.

3. Whether the Court of Appeals erred in holding that it was proper for the trial court, over objection, to admit evidence (and thus permit the government to amend its indictment) of acts some one or two years

after the date that the government alleged in its indictment the conspiracy terminated, and when the undisputed and unimpeached evidence conclusively showed that Petitioner was not present and did not participate in the subsequent acts of others which were used against Petitioner.

4. Whether the Court of Appeals erred by holding, in effect, that the evidence was sufficient to show a conspiracy, and when the undisputed evidence showed that the Petitioner did not enter into any "agreement" to commit a crime; and in permitting the introduction of hearsay acts and declarations of Chavana and others against Petitioner.

5. Whether the Court of Appeals erred in refusing to consider Petitioner's assignment of the trial Court's error in permitting evidence of prior offenses that were

committed and consummated prior to the time the Petitioner allegedly became a member of the alleged conspiracy, and in permitting the introduction of hearsay acts and declarations of Chavana and others against Petitioner.

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UNITED STATES OF AMERICA

Petitioner, GERARDO VILLARREAL, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A-1) has not been reported yet. Its opinion on rehearing is not reported yet (App. A, infra, A-22).

JURISDICTION

The Court of Appeals denied the petition for rehearing on August 16, 1985. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). The judgment of the district court is set out in App. B, infra, B-1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

The statutes involved are set forth in App. C, infra, C-1. They are: 18 U.S.C. Sec. 1951 and 1952.

STATEMENT

The Petitioner, a deputy sheriff, was indicted for allegedly conspiring with one Chavana, also a deputy, to extort money

from operators of massage parlors in exchange for lax enforcement of a county ordinance regulating such parlors (Count 1); and for allegedly aiding and abetting Chavana, and wilfully ....under color of official right, and by means of inducing fear, obtaining money ....by means of extortion ....from a person operating a business in interstate commerce ....thereby obstructing, delaying, and affecting commerce, on three separate occasions (the substantive offenses of Counts 2, 3, and 4, all in violation of 18 U.S.C. Sec. 1951 and 1952. The jury acquirred the Petitioner of the substantive counts, but convicted him of Count 1 (conspiracy). This is the essence of the charges. He was sentenced to 5 years imprisonment. Probation was denied, and he appealed to the Fifth Circuit Court of Appeals, which affirmed the

conviction. His petition for rehearing was denied.

The indictment alleged that the alleged conspiracy began on March 1, 1981, and ended on October 5, 1981. Chavana, the alleged co-conspirator was arrested on October 13, 1981, indicted on November 9, 1981, and plead guilty a week or so later. Some 30 months later, on May 4, 1984, the Petitioner was arrested; and indicted on May 10, 1984.

The original conspiracy involved Chavana and one Carreon (his supervisor officer). It is this conspiracy that the Defendant is alleged to have entered in September or October, 1981. To prove this, the government introduced the testimony of Chavana that in September or October, 1981, he knew that the Petitioner was having some financial

problems. Carreon was dead at this time, and Chavana had "all this" money and he "didn't know what to do with it"; and he gave the Petitioner some, and "he gave it back". A day or so later, he took "not quite as much" and went back and again gave it to Petitioner. He "believed" that he told Petitioner he got it from a massage parlor and "not to worry about it" (i.e. we contend this was in reference as to when and how it would be repaid). He further testified that this was the only occasion he gave the Petitioner any money; that he knew Petitioner needed the money, and "I wanted to implicate somebody besides myself when I gave him the money". He repeatedly testified that until this occasion the Petitioner had absolutely no knowledge of his activities with Carreon, or of his activities during the months

of March, April, May, June, July, and August, 1981; nor was Petitioner aware of his solicitations when the Petitioner was with him on inspections and Chavana was out of the Petitioner's presence. Chavana also testified that when he gave the Petitioner some money on one occasion, the Petitioner looked at him funny, and Chavana then stated that he got it from a massage parlor, and "don't worry about it"; but that Petitioner never did anything other than accept it, and keep quiet about it, because he needed it. He further testified on cross that Petitioner never undertook to aid Chavana in creating a belief among the operators that they wouldn't be raided. The sheriff, Petitioner, and Chavana testified that the Petitioner was assigned by the sheriff on one or two occasions to accompany Chavana in order

to become familiar with the inspection procedures on these parlors. On these occasions, Chavana, at two or three locations, and while out of the Petitioner's presence, solicited money from the operators. On one occasion, while the Petitioner waited in his car, he took money, put it in his pocket, and left. One witness, Ms. Reidel, first testified that on one occasion while the Petitioner waited in the car, Chavana came in and talked to her, and then introduced her to Petitioner while he was sitting in the car, and told her that if he, Chavana, couldn't come out to do the inspection, and the collection, Petitioner would. There was no evidence that Petitioner heard this remark, much less understood exactly what Chavana meant if he did hear it. Chavana denied making the statement, and on Cross-

examination Ms. Reidel corroborated him, and qualified and retracted this statement by testifying that Chavana only stated that if he couldn't make an inspection, Petitioner would, and that was all Chavana said, and that "he didn't say what for". The government never attempted on re-cross to have the witness either qualify or modify this answer, or explain the retraction.

The Court of Appeals, in its original opinion, has misconstrued or misstated the testimony of C.B. Moore, who owned a parlor, and also owned an "adult" theater. The court infers that his "theater" was raided by Petitioner, Chavana, and others because he refused to pay. Moore testified that the theater was raided--not the parlor; and that at the time Chavana talked to him, he already had three cases pending against the theater; that Chavana told him (about

the theater) "We can't help you". Petitioner testified that the sheriff's office had "a lot of complaints from a lot of people" about the theater; that there was a lot of publicity in the media about these type "theaters"; and that he was on the raid because of these complaints. The Court of Appeals only partially quoted the evidence that Chavana said to Petitioner on one occasion at Moore's parlor, "Do you want to talk to him?", and Petitioner replied, "No, you talk to him", at which point Petitioner "left the room and Chavana proceeded with the solicitation". This is an incomplete statement of the testimony. Both Moore and Petitioner testified that Chavana told Moore, after an inspection, that his place was dirty, and that he should take steps to clean it up. At that point, the question and answer set out above

were made. The Petitioner was just beginning to learn about the requirements of an inspection, and the question about "talking" to Moore was in reference to the cleanup details.

The Court of Appeals' original opinion infers that the witness, Shallotte Slade, an operator, refused to pay and was soon arrested. She testified that Chavana solicited money from her while she and Chavana were in a back room out of the hearing and sight of Petitioner. She also testified she was subsequently arrested for a "robbery of some sort", that was reduced to a misdemeanor of which she was convicted. She testified she was on parole from a two year conviction for aggravated promotion of prostitution.

The Court of Appeals' original opinion states that since Petitioner failed

to investigate Chavana's actions when he was in charge of the office from 5:00 PM and 1:00 AM, it shows they were parties to a conspiracy. The sheriff, Chavana, and the Petitioner all testified that Petitioner had no supervisory authority over Chavana--only the sheriff and one Arcos, his next in command, had this authority. In addition, Chavana testified the Petitioner had no knowledge of his activities and that when he gave Petitioner some money he "believed" he told Petitioner he got it from a parlor-- and nothing else.

Chavana testified that he gave Petitioner some money in September or October, 1981. The government conceded in its brief in the Court of Appeals that Carreon, whom Chavana testified was his only other conspirator prior to this time, died in August, 1981.

All of the operators who testified, stated that from his actions and conduct, it did not appear to them that the Petitioner knew what Chavana was doing out of his presence. The Court of Appeals held that this evidence, was sufficient to show an agreement to commit a crime and a conspiracy.

Based on this testimony, the trial court permitted the government to introduce hearsay acts and statements of Chavana when the Petitioner was absent beginning on March 1, 1981, and ending on October 5, 1981. The trial Court made a finding that the acts and declarations were in furtherance of the conspiracy, and, therefore, admissible against Petitioner. The Court of Appeals held that the evidence was admissible. The trial Court instructed the jury on accomplice testimony after telling

them that Chavana was an "alleged" accomplice. Petitioner timely filed a written request asking the court to define the term for the jury as "an accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent". This requested charge was refused by the trial court. The Court of Appeals refused to rule on, or even discuss, this omission. In addition, the trial court charged the jury that they could convict the Petitioner on the uncorroborated testimony of an "alleged" accomplice if they believed such testimony beyond a reasonable doubt. In Petitioner's requested charge on accomplice testimony, the court was asked to charge "also, a verdict of not guilty may be based on the uncorroborated testimony of an accomplice". This was refused, and the Court of Appeals held that

the refusal was proper.

The trial Court, over vigorous objection, permitted the government to introduce evidence from Chavana's wife that some one or two years after Chavana's arrest some members of the sheriff's office loaned her some money to help her with her children who were about to enter school. This was one or two years after the conspiracy is alleged to have terminated. The Petitioner was not present on these occasions, and made no loans to Mrs. Chavana. The government offered this evidence to show, among other things, that the conspiracy was still in existence; and to show that the defendant must be guilty because he made no loans to her. The Court of Appeals held that the evidence was admissible to prove the existence of the original conspiracy though the government did not tender the evidence on this ground.

The undisputed evidence shows that at no time did the Petitioner enter into an agreement to commit a crime. The Court of Appeals held that the evidence was sufficient to show an agreement, and thus, the taking of the money, alone, made the Petitioner a member of the conspiracy--when the undisputed evidence showed that the only other member of the original conspiracy was dead at the time of this occurrence, and, therefore, that conspiracy was terminated. The Court of Appeals refused to discuss or rule on this question. The trial court, after finding the hearsay acts and declarations were made in furtherance of the alleged conspiracy, permitted evidence that Chavana, outside the Petitioner's presence, took or extorted money from March, 1981, until October 5, 1981--the alleged termination date. Chavana testified that he gave the Petitioner some

money in September or October, 1981; and that the Petitioner had no knowledge of his prior illegal activity. Thus, the trial court permitted evidence of prior consummated offenses that occurred before the Petitioner became a member of the alleged conspiracy. The Court of Appeals refused to discuss or rule on this point.

The trial court also permitted testimony of a female employee of a parlor, one Ms. Rivera, that she, at her employer's request, had sex with Chavana months before he gave the defendant some money. There was no showing that this was a "payoff" or that Chavana had requested her employer to make the "arrangements". The evidence shows conclusively that the Petitioner was not present during this encounter, nor was he aware of it. The trial Court apparently thought this was in furtherance of the con-

spiracy. The Court of Appeals did not discuss or rule on this point.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals, in its opinion, incorrectly applied the law in a manner contrary to, rather than in accord with, the law as enunciated by this Court. It is contrary to the Fifth Circuit's own precedent, and it conflicts with the holdings of other Circuit Courts' holdings. In effect, it has overruled the holdings of this Court in the following cases which will be pointed out shortly:

COOL v. U.S., 409 U.S. 100 (1973)
STIRONE v. U.S., 361 U.S. 216; 80 S.Ct 270 (1960)
EX PARTE BAIN, 121 U.S. 1
IANNELLI v. U.S., 410 U.S. 770 (1975)
LEVINE v. U.S., 383 U.S. 265 (1966)

The mandates of this Court in the above cases have been either totally ignored or

misconstrued by the Court of Appeals. The Court of Appeals has made a sweeping departure from the accepted and usual course of judicial proceedings. Exercise of this Court's power of supervision would accordingly be called for.

2. The failure of the trial court to define the term "accomplice" was not even mentioned by the Court of Appeals even though this point was vigorously urged in his briefs as well as in oral argument before the court. The trial court instructed the jury there was one "alleged" accomplice. The term "accomplice" is a legal one, and should be defined to a lay jury especially if the trial court instructs them on such testimony. Due process demands that Petitioner be accorded a fair trial. The vice here is twofold; first, the trial court instructed the jury

that the government was relying on the testimony of ONE "alleged" accomplice (Chavana) without telling them how to determine if he WAS IN FACT AN ACCOMPLICE and, second, by instructing them AS A MATTER OF LAW that there was only ONE "alleged" accomplice, the Petitioner was prevented from arguing to the jury that certain other witnesses who "voluntarily and with common intent" united with Chavana in the commission of a crime by voluntarily offering money to him were IN FACT accomplices themselves. This error was extremely damaging and harmful to Petitioner. By refusing to define the term, the trial court kept the jury in total darkness as to how they were to decide whether he was in fact an accomplice. Since no trial court has failed to define the term once the court instructed on such testimony, Petitioner has found

no appellate opinions where the trial court failed to define the term. However, the Fifth Circuit ignored its own precedent in U.S. v. JONES, 673 F.2d 115 (1982), where the court held that if a proper requested charge on accomplice testimony is made and refused by the trial court, it constitutes reversible error.

3. The Court of Appeals holding that the failure of the trial court to instruct the jury that they could acquit the Petitioner on the uncorroborated testimony of an accomplice, when the trial court instructed them that they could convict him on such uncorroborated testimony is in direct conflict with this Court's opinion in COOL v. U.S., 93 S.Ct. 354 (1973), and in addition conflicts with the holding of another circuit court in U.S. v. STULGA, 531 F.2d 1377 (10th Cir. 1976). The Court of Appeals

holding is based on a total misconstruction of these two opinions. In both these cases, the accomplices testified that the defendant HAD NO KNOWLEDGE of what the accomplice was doing--JUST AS CHAVANA TESTIFIED THAT THE PETITIONER HAD NO KNOWLEDGE OF CHAVANA'S ACTIVITIES. In both cases the term "accomplice" was DEFINED. The Court of Appeals stated in its opinion (p.A-17): "In Cool, the Court found that because of the peculiar phrasing of a jury instruction, the jury was, in effect, erroneously instructed to disregard an accomplice's exculpatory testimony unless the jury found the testimony credible beyond a reasonable doubt. No such erroneous instruction was given here." This is an inaccurate statement of the facts AND holding in Cool. The trial court in that case DID NOT EVEN MENTION

the accomplice's EXCULPATORY testimony. The Court of Appeals has confused Stulga for Cool. However, in Stulga the relevant part of the charge for our purposes was:

> "...You should not convict a defendant upon the unsupported testimony of an accomplice UNLESS YOU BELIEVE THE UNSUPPORTED TESTIMONY BEYOND ALL REASONABLE DOUBT."

The trial court in Petitioner's case charged:

> "You should never convict a defendant upon the unsupported testimony of an ALLEGED accomplice UNLESS YOU BELIEVE that testimony BEYOND ALL REASONABLE DOUBT." (emphasis added in both charges).

In Cool, the trial court charged: "... if the testimony carries conviction and you are convinced it is true beyond a reasonable doubt...I further instruct you that testimony of an accomplice may alone and uncorroborated suport your verdict of guilt of the charges...if believed by you beyond

a reasonable doubt..." This charge is almost idential to the one given in Petitioner's case.

Both Stulga and Cool hold, in effect, that ANY exculpatory testimony by an "alleged" accomplice mandates a charge by the trial court, IF HE INSTRUCTS THE JURY THEY CAN CONVICT ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE, that the jury can LIKEWISE ACQUIT ON SUCH UNCORROBORATED TESTIMONY. The Court of Appeals has ignored the mandates of Cool, and is in direct conflict with Stulga.

In Cool, this Court stated that the vice in the above charge was that the jury was instructed, in effect, to disregard the accomplice's exculpatory testimony unless they believed it beyond a reasonable doubt, and that such a charge places an improper burden on the defense, and

allows the jury to convict despite its failure to find guilt beyond a reasonable doubt. This court stated that such a charge requires the jury as a predicate to the CONSIDERATION of certain evidence it must find it true beyond a reasonable doubt. This Court further stated that the defendant had a Sixth Amendment Right to present to the jury exculpatory testimony of an accomplice, and that the charge given obstructs that right by totally excluding RELEVANT evidence unless the jury makes a preliminary determination that it is extremely reliable. This Court further stated that the chrage had the effect of SUBSTANTIALLY REDUCING the government's BURDEN OF PROOF. The court went on to say that the Constitution requires proof of guilt beyond a reasonable doubt, and that the accomplice's testimony that the

DEFENDANT HAD NO KNOWLEDGE of the accomplice's activities might have created a reasonable doubt in the jury's mind, but it was not considered because the testimony itself was not believable BEYOND A REASONABLE DOUBT. By creating an artificial barrier to the CONSIDERATION of relevant exculpatory matter putatively credible by a preponderance of the evidence the trial court reduced the level of proof necessary for the government to carry its burden, and, in effect, required the defendant to prove his INNOCENCE BEYOND A REASONABLE DOUBT. The Court concluded by stating that even if the accomplice gave some INCRIMINATING testimony,

> "...the instruction was STILL FUNDAMENTALLY UNFAIR in that it told the jury that it could CONVICT SOLELY on the basis of accomplice testimony WITHOUT TELLING IT THAT IT COULD ACQUIT ON THIS BASIS. Even HAD THERE BEEN NO OTHER ERROR, the con-

> viction WOULD HAVE TO BE REVERSED on the basis of THIS INSTRUCTION ALONE." (n. 4, p. 357, S.Ct) (emphasis added).

In Stulga, the court quoted extensively from Cool and concluded that the same vice was present, and reversed the case. Petitioner's conviction should not be upheld under this Court's holding in Cool, and the conflict in the Fifth Circuit's holding in this case with the Tenth Circuit's holding in Stulga should be resolved once and for all.

4. The Court of Appeals holding that evidence of loans made to Mrs. Chavana some one or two years after the government alleged the conspiracy was terminated is in direct conflict with this Court's holding in STIRONE v. U.S., 361 U.S. 216, (1960), and this Court's holding in EX PARTE BAIN, 121 U.S. 1, 7 S.Ct. 781 (1887)

in that the Court of Appeals holding permitted the government, in effect, to amend the indictment in this case, and try the Petitioner for charges not made in the indictment. The Court of Appeals holding also misconstrues, and thus is in conflict with, U.S. v. TESTA, 548 F.2d 847 (9th Cir. 1977).

As pointed out in the STATEMENT at the beginning of this petition, evidence of loans made to Mrs. Chavana some one or two years after the conspiracy was alleged to have ended were introduced against Petitioner to show, among other things, that his failure to lend her money was evidence of guilt, and was proof that the CONSPIRACY ALLEGED WAS STILL IN EXISTENCE, even though the government alleged in the indictment the conspiracy was terminated on October 5, 1981. This holding

by the Court of Appeals, in effect, overrules this Court's holding in Stirone that the defendant cannot be tried on charges not made in the indictment, and that the charges cannot be BROADENED except by the Grand Jury. This Court stated:

> "...the error cannot be dismissed as merely an insignificant variance between the allegations and proof and thus harmless error...(citing cases)...The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment..."(at p. 272).

The Court relied on Ex Parte Bain, supra, and then went on to say: "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment.

The undisputed evidence in Petitioner's

case showed that Mrs. Chavana ASKED for these loans--they were not UNSOLICITED PAYMENTS by members of the sheriff's office. The Court of Appeals' original opinion repeatedly states that these were PAYMENTS, and this is not in accord with the evidence. Mrs. Chanava further testified she intended to repay these loans. The trial court permitted the introduction of her hearsay acts and statements when asking for these payments when the evidence showed that the Petitioner was not present, and did not made any loans to her. The Court of Appeals ignored this Court's holding in Stirone, and based its opinion on the Ninth Circuit's opinion in Testa (supra) and stated that under Testa acts done after the termination of the allged conspiracy were admissible to prove the existence of

the conspiracy ALLEGED. The government, in its proffer of this evidence, did not offer it for this purpose. The evidence was offered, among other reasons, to show that the conspiracy STILL EXISTED, and thus, to amend the indictment and change the grand jury's allegations as to when the alleged conspiracy terminated by proving, contrary to the allegations--and thus a harmful variance--that it had terminated on October 5, 1981. The hearsay acts and declaration of Mrs. Chavana and others in the Petitioner's absence were also offered to prove THEIR TRUTHFULNESS. The Court of Appeals' opinion partially quotes a sentence from the opinion in Testa to support its holding, but "deletes" the qualifying language in that opinion (emphasis added): "Similarly, acts by others (and STATEMENTS BY OTHERS, IF NOT OFFERED FOR

THE TRUTH) before or after the conspiracy may be relevant in suggesting the existence and aims of the conspiracy charged." Also, the trial court in Testa instructed the jury (emphasis added): "...statements of any conspirator, which are not in furtherance of the conspiracy, or were made before its existence, OR AFTER ITS TERMINATION, may be considered as evidence ONLY AGAINST THE PERSON MAKING THEM." (at 852). In Petitioner's case, no such instruction was given. Also, in Testa there was no allegations in the indictment as to WHEN the conspiracy terminated, and the court stated that the ALLEGED conspiracy had not terminated (p. 852).

For the Court of Appeals' failure to follow this Court's mandates in Stirone and Ex Parte Bain, and for its conflict

with Testa's holding as to limited admissibility, Petitioner's conviction should not be allowed to stand.

4. The Court of Appeals holding that the evidence was sufficient to support a finding that Petitioner entered into an agreement to commit a crime, and thus a conspiracy, is in conflict with this Court's holdings in IANNELLI v. U.S., 220 U.S. 770. In addition, the holding is contrary and conflicts with its own precedents in U.S. v. WADDY, 536 F.2d 632 (5th Cir. 1976); YOUNG v. U.S., 48 F.2d 26 (5th Cir. 1931). It also conflicts with the holdings of other Circuit Courts' opinions in U.S. v. BORELLI, 336 F.2d 376 (2nd Cir. 1964) cert. denied, 379 U.S. 960; CLEAVER v. U.S., 238 F.2d 766 (10th Cir. 1956); U.S. v. AVILES, 274 F.2d 179 (2nd Cir. 1960); U.S. v. FALCONE, 109

F.2d 579 (2nd Cir. 1940) affirmed, 311 U.S. 204, 61 S.Ct. 204 (1940).

As set out in the STATEMENT at the beginning, there was no evidence that Chavana EVER told the Petitioner that: 1. there was an EXISTING CONSPIRACY between Carreon and him for Petitioner TO ENTER; 2. that he, Chavana and Carreon were engaging in illegal activities; 3. that the money he was giving or "loaning" Petitioner from a massage parlor was obtained through EXTORTION, or illegally, or under COLOR OF OFFICIAL RIGHT, and by inducing fear (all of which was alleged in the indictment). Assuming that a conspiracy was in existence even though the other conspirator, Carreon, was dead at the time of the money incident, some of the above authorities hold that MERE KNOWLEDGE of it does not constitute AN

AGREEMENT TO ENTER INTO the conspiracy. Assuming an ENTRY into this speculative conspiracy, it would only be an agreement TO CONCEAL, with which the Petitioner is not charged. Nor is aiding and abetting sufficient to show an AGREEMENT, and the government must prove that the Petitioner understood the basic provisions of the agreement, all of which this Court has held in Iannelli, supra, to be necessary. "It is essential to determine WHAT KIND OF AGREEMENT or understanding EXISTED AS TO EACH DEFENDANT", U.S. v. Borelli, supra. Nor can a conspiracy be established by suspicion. Mere association (such as the Petitioner being assigned by the sheriff to accompany Chavana and observe these inspections does not establish a conspiracy to commit a crime. There must be some evidence of some participation or interest

in the COMMISSION of the offense, U.S. v. Falcone, supra. Similarly, assent is an essential for the conspiracy count, U.S. v. Waddy, supra. Nor does mere knowledge of the conspiracy constitute one a conspirator. In Cleaver v. U.S., supra, the government proved knowledge of the conspiracy by PROVING that the defendant was present during a number of conversations among the various conspirators. The court said (emphasis added):

> "Webster, however, did not participate in the PLANNING or the burglarly, although HE WAS PRESENT during a number of conversations among the various conspirators. MERE KNOWLEDGE, APPROVAL OF OR ACQUIESCENCE in the object or the purpose of the conspiracy, WITHOUT AN INTENTION AND AGREEMENT to cooperate in the crime IS INSUFFICIENT to constitute one a conspirator."

Similarly, the Fifth Circuit itself held in Young v. U.S., supra, that mere knowledge of or acquiescence in a crime

that WAS ABOUT TO BE COMMITTED was insufficent for a conspiracy, and that active participation with the parties acting in concert were essential. The money incident, as set out in the STATEMENT, as a matter of law, did not establish that the Petitioner AGREED TO COMMIT (in the future) a crime. Nor does the other evidence show an AGREEMENT by Petitioner to actively participate, or WHAT KIND OF AGREEMENT or understanding EXISTED AS TO EACH DEFENDANT as required by Borelli, supra.

In U.S. v. Aviles, the 2nd Circuit held that the single act of purchasing narcotics from a conspiracy group did not prove participation. Justice Learned Hand, in Falcone, after stating that knowledge of a conspiracy is insufficient, stated:

"...he must in some sense promote their venture himself, MAKE IT HIS OWN, HAVE A STAKE IN ITS OUTCOME. The distintion is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy ALL THOSE who have been ASSOCIATED in ANY DEGREE whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell the illicit distillers; but, both morally and legally, to do was toto coelo different from JOINING THEM in running the stills," (at p. 581, emphasis added).

The Court of Appeals holding conflicts with all of the above holdings by this Court, and the other Circuit Courts, and the conviction should not be allowed to stand.

Also, the hearsay acts and declarations of Chavana and others should have been excluded from the evidence in this case

as the above holdings state no conspiracy was proved. The Court of Appeals' holding that since no objection was made to some testimony, the plain error rule applies begs the questions. Since the trial court made a specific finding that the hearsay matter was in furtherance of the alleged conspiracy, any objection by Petitioner would have been futile and useless, and repeated objections would have only antagonized the court and jury. The court also held that even if an objection had been lodged, there was no abuse of discretion in permitting the matter to be introduced. Again, an objection would thus have been useless. Since the hearsay matter was extremely harmful and damaging to Petitioner, the conviction should not be allowed to stand.

5. The Court of Appeals refused to

consider, discuss, or rule on Petitioner's contention, set out in his original brief and argued orally, that the trial court erred in permitting the introduction into evidence of hearsay acts and declarations of Chavana and others that showed the commission of consummated offenses that occurred PRIOR to the Petitioner's alleged entry into the alleged conspiracy. Assuming, for argument, that a conspiracy was still in existence when the money incident occurred, and that this made him a member, all consummated offenses that occurred before this time are inadmissible against Petitioner. By refusing to rule on the admissibility of this evidence, the Court of Appeals has pointedly ignored this Court's holding in LEVINE v. U.S., 383 U.S. 265 (1966). This Court, in a PER CURIAM opinion, reversed the

convictions of those defendants against whom evidence of prior consummated offenses by other conspirators was introducted, and stated the principle: "An individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy BEFORE that individual joined or after he had withdrawn from the conspiracy." (at p. 266). The trial court permitted the Bowens to testify that they HAD PAID Chavana $400.00 in June, July, August, September, and October, 1981. Assuming, for argument, that Chavana's giving or loaning money to Petitioner in September or October, 1981, Petitioner joined a conspiracy, the prior consummated crimes in June, July, and August were inadmissible. Similarly, the trial court permitted Mrs. Reidel to testify that in May

and August, 1981, she paid Chavana money. These were substantive consummated offenses. The trial court permitted Ms. Rivera to testify that she was a prostitute, and at the request of her employer she had sex with Chavana on one occasion prior to the money incident. By ignoring Petitioner's contention in his brief and oral arguements that there was no evidence that this act was part of any payoff, and, therefore not in furtherance of the conspiracy, if any, the court has ignored precedents of this Court, its own precedents, and those of ALL Circuit Courts. In addition, since fornicating with a prostitute, or a person not your wife, is a crime under Texas law, this offense was, as a matter of law, A CONSUMMATED one. The conviction should not be allowed

to stand.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals, for the Fifth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been served upon The Solicitor General, Department of Justice, Washington, D.C., 20530, by depositing the same in the United States Port Office mailbox, with postage prepaid, on this the 7th day of August, 1985.

Charles Lieck

CHARLES J. LIECK, JR.

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GERARDO ADOLF VILLARREAL,
a/k/a Jerry

v.

UNITED STATES OF AMERICA

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPENDIXES

Appendix A

Opinion on Appeal from the United States District Court for the Western District of Texas A-1

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Appendix B

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Appendix C

Title 18, United States Code, Section 1951 C-1

Title 18, United States Code, Section 1952 C-4

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1847

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERARDO ADOLF VILLARREAL,
a/k/a JERRY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(June 20, 1985)

Before BROWN, POLITZ and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case is an appeal by a lieutenant in the sheriff's office of Bexar County, Texas, from a criminal conviction under the Hobbs Act, 18 U.S.C. §1951, for con-

spiracy to extort protection money from operators of massage parlors in the San Antonio, Texas, area. Because we find sufficient evidence to support the conviction, and in addition find no reversible error, we affirm.

I.

The defendant-appellant Villarreal was hired as a lieutenant in the Bexar County sheriff's office by Joe Neaves soon after Neaves took office as the newly elected sheriff in January 1981. In that position Villarreal had only three supervisors: Neaves, an assistance chief, and Chief Deputy Manuel Arcos.

Villarreal was indicted for violation of the Hobbs Act, 18 U.S.C. §1951,[1] as well

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[1]Section 1951 states in pertinent part:

(a) Whoever in any way or degree ob-
(cont'd)

as with various substantive offenses. The government charged that Villarreal had conspired with Thomas Chavana to extort money from "massage parlor" operators. This conspiracy was alleged to

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structs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

....

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

have begun about March 1981, and extended to about October 1981. Chavana, a lieutenant in the sheriff's office, was involved by way of his official obligations in the enforcement of municipal regulations of "massage parlors," which were actually thinly veiled houses of prostitution. Chavana admitted to conspiracy with his then supervisor Alfred Carreon to extort "protection" money from the various massage parlors in the San Antonio area. Evidence was presented indicating the conspiracy with which Villarreal was charged overlapped the Chavana/Carreon conspiracy to some extent.

The evidence adduced at trial, which is discussed in more detail below, indicated that Chavana was primarily responsible for collecting payments from massage parlor operators, but that Villarreal would some-

times accompany him to the massage parlors at the times the payments were made. In particular, Florence Reidel, the operator of one parlor, gave testimony which, interpreted in the light most favorable to the government, indicates that she was told by Chavana in Villarreal's presence that she could make payments to Villarreal if the need arose. Moreover, C.B.Moore, the owner of another parlor testified that Villarreal and Chavana visited him and that Chavana solicited money from Moore. Villarreal left the room. Moore refused to pay and his establishment was subsequently raided by the sheriff's department. Shallotte Slade, another parlor operator, testified that Chavana solicited money from her in one room of her massage parlor while Villarreal waited in another. Slade also re-

fused to pay and was subsequently arrested by members of the sheriff's department. Following a jury trial, Villarreal was acquitted on all but the conspiracy count of 18 U.S.C. §1951. Villarreal was sentenced to five years in prison. He appeals from this conviction and sentence, alleging insufficiency of evidence and various reversible errors in his trial.

II.

Villarreal challenges the admissibility of out-of-court statements of Chavana which were admitted by the trial court as statements of an alleged co-conspirator made in the furtherance of the conspiracy. See James v. United States, 590 F.2d 575 (5th Cir. 1979 (en banc). James permits the use of such statements of alleged co-conspirators where a pre-

ponderance of the evidence other than the out-of-court statements indicated that the conspiracy existed, that the defendant and the alleged co-conspirator were members of it, and that statements were made in the course of and in furtherance of the conspiracy. James at 583. In these circumstances the out-of-court statements are not hearsay. Id.; Fed. R. Evid. 801(d)(2)(E). Because the trial court's determination that the out-of-court statements were made in the course of and in furtherance of an ongoing conspiracy of which Villarreal was a member, is supported by the evidence, we hold that to admit the hearsay statements was not an abuse of the trial court's discretion.

Considering an appeal from a criminal conviction, we must interpret the

evidence in light most favorable to the government. Viewed in this light, independent evidence supporting the James determinations made by the district court is substantial. First, Villarreal accompanied Chavana on visits to the massage parlors during which Chavana solicited money from massage parlor personnel. Reidel, the manager of Belle's massage parlor, gave testimony which a reasonable jury could interpret as asserting that in June 1981 Villarreal once waited in the car outside Belle's while Chavana entered and solicited money.[2]

C.B. Moore, the manager of the Moonshine Spa and the Puss & Boots Theatre, testified that Villarreal and Chavana vis-

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[2]The "verbal act" of soliciation itself does involve hearsay. United States v. Burke, 495 F.2d 1226 (5th Cir. 1974).

ited him in 1981 and that Villarreal left the room and Chavana solicited money from Moore. Moore refused to pay, and a few days later Villarreal and Chavana participated in a "raid" on the Puss & Boots Theatre.

Shallotte Slade, owner of the Pleasure Place massage parlor, testified that in the summer of 1981 Villarreal waited in one room of her establishment while Chavana solicited money from her in the next. Slade also refused to pay and was soon arrested.

Second, Villarreal's own testimony indicated that he had substantial authority in the sheriff's office; indeed, he was in charge of the office between 5:00 p.m. and 1:00 a.m. His failure to use his authority to investigate Chavana's actions helps to support the conclusion that Vil-

larreal and Chavana were parties to a conspiracy.

Third, Chavana testified that he gave Villarreal money in August 1981, telling him that the moeny came from the massage parlors.

Fourth, Chavana testified that massage parlors were making payments to members of the sheriff's office as early as April 1981.

The foregoing independent evidence is sufficiently substantial in fully support the trial court's James determinations. Accordingly, out-of-court statements made by Chavana after implicating Villarreal were properly admitted into evidence.

III.

The evidence adduced at trial, including the out-of-court statemenst admit-

ted under James is sufficient to support Villarreal's conspiracy conviction. To convict for criminal conspiracy "the jury must find 'an agreement between two or more persons to commit a crime, and an overt act by one of the conspirators to further the conspiracy.'" United States v. Lyons, 702 F.2d 815, 822 (5th Cir. 1983) (quoting United States v. Khamis, 674 F.2d 390, 392 (5th Cir. 1982).

There is no question that Chavana committed many criminal "overt acts" in extorting money from the massage parlor operators. Moreover, there is evidence sufficient to allow a reasonable trier of fact to conclude beyond a reasonable doubt that Villarreal and Chavana entered into an agreement to extort money from the massage parlor operators, pursuant to which Chavana performed his "overt acts."

Unites States v. Saenz, 747 F.2d 930, 938 (5th Cir. 1984). As in the above analysis, we must again construe the evidence in the light most favorable to the government. Id.

Reidel testified that during the visit to Belle's massage parlor, Chavana asked Reidel to come outside and meet Villarreal who was waiting in the car. After introducing Reidel to Villarreal, Chavana said to Reidel that she could make payments to Villarreal if the need arose. Reidel testified that Chavana made this statement within Villarreal's hearing, and that he did not object.

Villarreal now argues that this out-of-court statement of Chavana should be excluded as hearsay; we do not agree. As already mentioned above, the trial court did not err in admitting this statement

of the Omega Spa parlor, testified that Villarreal accompanied Chavana to a trip Chavana made to collect money from that parlor; again, Chavana collected and Villarreal remained outside in the car. This was in October 1981. Villarreal also accompanied Chavana on inspections of the Omega Spa, according to Bowen.

John Falvey, who owned property on which another parlor operated, testified that Chavana solicited money from that establishment, and that Chavana later met him at a party and explained: "You know, about this money I'm getting...it's not just me...I got to spread it around."

C.B. Moore testified that when Chavana and Villarreal visited him in the summer of 1981 Chavana turned to Villarreal and said, "Do you want to talk to him?" and Villarreal responded, "No, you

talk to him." At that point Villarreal left the room and Chavana proceeded with the solicitation.

Finally, in both September and October of 1981, the FBI videotaped Chavana collecting money from Reidel. On one of these videotapes Chavana states that because Slade refused to "pay up," he executed warrants against her. As already noted above, Slade testified that Chavana asked her to "pay up" while Villarreal waited in another room of Slade's parlor. Later Slade was arrested. Under James, all of the above evidence was properly received.

The evidence would certainly permit a reasonable jury to conclude beyond a reasonable doubt that Villarreal and Chavana reached an agreement to extort money from massage parlor operators with

Chavana playing the role of the more active partner. Accordingly, we cannot set aside this conviction on the gounds of insufficiency of the evidence.

IV.

Villarreal also asserts that the acts involved in this case did not sufficiently involve interstate commerce as required by 18 U.S.C. §1951 (the Hobbs Act). However, "the Hobbs Act only requires a minimal interference with interstate commerce." United States v. Sorrow, 732 F.2d 176 (11th Cir. 1984). The massage parlors here used credit cards whose bills were sent through interstate mails. Products such as alcohol were also involved in interstate commerce. Accordingly, Villarreal's argument is without merit.

V.

Villarreal contends that the district court committed reversible error

in failing to expressly instruct the jury that it could acquit as well as convict Villarreal on the basis of the testimony of the massage parlor operators who, Villarreal asserts, could have been found by the jury to have been accomplices in the conspiracy charged. However, there is no evidence that the victims of this conspiracy were, in fact, accomplies. Therefore, even in the unlikely event that it was error to fail to give the requested instruction, the error was harmless.

Villarreal's reliance on Cool v. United States, 93 S.Ct. 354 (1973) and United States v. Stulga, 531 F.2d 1377 (10th Cir. 1976), is misplace. In Cool, the Court found that because of the peculiar phrasing of a jury instruction, the jury was, in effect, erroneously instructed to disregard an accomplice's exculpatory

testimony unless the jury found the testimony credible beyond a reasonable doubt. No such erroneous instruction was given here.

Stulga also turned on its peculiar facts. In that case a wealth of exculpatory testimony and virtually no inculpatory evidence was offered by accomplices. Nevertheless, the trial court instructed the jury that it could convict on the basis of the accomplice testimony, but did not instruct the jury that it could acquit on the basis of this testimony. On the facts and the peculiar circumstances of this case, the Tenth Circuit held that the trial court's refusal to instruct as to the exculpatory testimony could have had the effect of instructing the jury to discount it. In the present case there is no wealth of exculpatory testimony nor a

paucity of inculpatory testimony, nor has anything else in the jury charge been brought to out attention which would allow "the jury to convict despite its failure to find guilt beyond a reasonable doubt." Stulga at 1380 (quoting Cool, 93 S.Ct. at 356). We conclude therefore that the trial court did not abuse its discretion in regard to this jury instruction.

VI.

Finally, Villarreal objects to the testimony of Chavana's wife that several members of the sheriff's office, including Sheriff Neaves, made payments to her after her husband was incarcerated. These payments at least raise the possibility that sheriff's department officials other than Chavana and Villarreal were involved in the conspiracy, and made payments to

Chavana's wife in order to cause Chavana to temper his testimony. However, Villarreal did not make such a payment to Mrs. Chavana, and he therefore argues that the testimony as to these payments was inadmissible, since they concededly occurred after the date the indictment states the conspiracy ended. However, that officers in the sheriff's department made payments to Chavana's wife after his arrest is relevant to the issue of whether the conspiracy charged in the indictment ever existed. "Acts by others...before or after the conspiracy may be relevant in suggesting the existence...of the conspiracy." United States v. Testa, 548 F.2d 847, 851 (9th Cir. 1977)(collecting cites). The trial court expressly instructed the jury that it was to consider the testimony only to determine if the

conspiracy charged in the indictment existed at the time charged in the indictment. That the evidence suggests that the conspiracy may have involved persons in addition to those charged in the indictment does not destroy its relevance as to the smaller conspiracy. Accordingly, the trial court did not abuse its discretion in admitting this testimony.

VII.

We have concluded that the evidence in this case is sufficient to support Villarreal's conviction on the conspiracy charge under 18 U.S.C §1951. Moreover, having found no reversible error in the trial, we affirm the conviction.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 84-1847

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERARDO ADOLF VILLAAREAL,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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On Petition for Rehearing
(Opinion June 20, 1985
(5th Cir. 1985) __F.2d__)

(August 16, 1985)

Before BROWN, POLITZ and JOLLY, Circuit Judges.

PER CURIAM:

Following this court's opinion affirming his conviction, Villarreal petitions us

to reconsider our decision. Having carefully considered Villarreal's petition for rehearing, we must again affirm his conviction.

Villarreal's petition places particular emphasis on what the petitioner characterizes as this court's misapprehension of the significant of the evidence against him. Because we are aware tht the consequences to Villarreal of our decision will be most serious, and because of the petitioner's manifest dissatisfaction with our appraisal of the evidence, we set out below our response to what the petition for rehearing takes as our more serious missapprehensions of the evidence.

First, we must stress that on appeal from a criminal conviction it is not the task of this court to reevaluate the evidence de novo; that is a function reserved

for the trial court. Rather, in evaluating the sufficiency of the evidence supporting a conviction, we must interpret the evidence in the light most favorable to the state; we must resolve all conflicts in the evidence in favor of the state; and, in addition, we must give the state the benefit of every inference which might reasonably be made from the evidence when it is construed so favorably to the state. In particular, where the evidence takes the form of testimony, we must resolve all credibility determinations against the convicted appellant. While all of the above is absolutely standard, we reiterate it once again because Villarreal's petition for rehearing undertakes a substantial rearguing of of the evidence, as discussed below.[1]

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[1]"Reviewing a conviction for suffi-
(cont'd.)

Villarreal Challenges our observation that Chavana testified that he gave money to Villarreal in August 1981; the petition characterizes our statement as "totally inaccurate." Villarreal contends that Chavana testified that he gave the petitioner money only in September or October of 1981.

We draw attention to Chavana's testimony on redirect examination by Mr. Con-

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ciency of the evidence requires this Court to view the evidence, including all inferences that may be reasonably drawn from it, in the light most favorable to the government. Glasser v. United States, 315 U.S. 60 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). 'It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.' United States v. Bell, 673 F.2d 546, 549 (5th Cir. Unit B 1982) (en banc)." United States v. Carter, 726 F.2d 1514 (11th Cir. 1984).

away:

Q. Prior to that time, did Mr. Villarreal have any knowledge, as far as you know, about any massage parlor activities up until the time you told him?

A. I have no idea other than until the time I told him.

Q. That's what I mean. If he knew about it from some other course, well, that's one thing, but I mean so far as you know, did he know about it from any other source?

A. Not that I know of.

Q. Now, the day whenever you tell us that you gave Mr. Villarreal the money, and he gave it back, can you tell us what date it was?

A. No, sir.

Q. All you can tell is it was 1981. That's about as close as you can get, the fall of 1981?

A. In August, I believe it was.

Q. And in the time, as I understand it, first time you gave him the money, he gave it back to you. How much time passed from the time that you gave him the money, and he returned it, and you gave him money a second time?

A. It was the next day. I believe it was either -- it was in September, somewhere in there. I really don't remember, one of those months.

Q. All right, sir. It was either August or it was September, but you're not sure?

A. Yes.

A reasonable jury could choose to interpret Chavana's testimony as indicating he gave money to Villarreal as early as August 1981; this court need not determine independently that the transaction occurred in August; we only resolve this conflict in the evidence in favor of the state.

Villarreal also objects, in his words, to this court's "infer(ring) in its opinion that C.B. Moore was 'raided' because he refused to pay Chavana." Again, we must point out that this court does not infer conclusions from the record

de novo; rather, we ask only whether a reasonable jury could have considered the fact that Moore was raided after refusing to "pay up" as evidence of the conspiracy. That other explanations for the "raid" may also be reasonable is not sufficient ground for us to determine a jury could not reasonably consider these events to be evidence of the conspiracy.

Similarly, Villarreal objects to our characterization of Shallotte Slade's arrest soon after she refused to make payments as evidence of the conspiracy; Villarreal points out that Slade testified she was arrested for a "robbery of some sort." Once again, that another reasonable explanation exists does not eliminate the possiblity that a reasonable jury could view the arrest of a woman who refused to pay off the authorities as sig-

nificant evidence of a conspiracy.

The petitioner also challenges our interpretation of Reidel's testimony that Chavana told her in Villarreal's presence that she could make payments to Villarreal instead of Chavana if the need arose. Villarreal points out that on cross-examination Reidel testified that Chavana didn't say what the payments were for; Villarreal characterizes Reidel as retracting her prior statement. However, the mere fact that Reidel testified that Chavana had not said what the payments were for is not inconsistent with her testimony that Chavana said she could make payments to Villarreal. Moreover, we must again point out that the issue here is whether a reasonable jury could interpret this testimony as significant

evidence.

In summary, Villarreal's objections to our analysis of the evidence are not well taken. We conclude that the evidence objected to in the petition for rehearing, together with the other evidence presented at trial, is sufficiently substantial for a reasonable jury to find Villarreal guilty as charged beyond a reasonable doubt.

In addition, we have reviewed the petitioner's objections to our interpretation of the relevant precedent, but we cannot agree with him in his interpretation of those cases.

PETITION DENIED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

v. NO. SA84CR097

GERARDO ADOLF VILLARREAL
a/k/a "Jerry"

JUDGEMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, September 12, 1984, with counsel, Charles T. Conaway, plea of not guilty.

There being a verdict of guilty on July 20, 1984; Defendant has been convicted as charged of the offenses of having willfully and knowingly combined, conspired, confederated and agreed together

with others to knowingly, willfully and unlawfully, under color of official right, and by inducing fear, obtained sums of money by means of extortion, as that term is defined in 18 U.S.C. §1951, from various owners and operators of businesses operating in interstate commerce generally designated as "massage parlors" which sums of money were not and would not be due either the conspirators nor to their office, thereby obstructing, delaying and affecting commerce by means of such extortion, in violation of 18 U.S.C. §1951, as charged in Count One (1) of the Indictment filed 5/10/84.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant

guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS, pursant to the provisions of Title 18, United States Code, Section 4205(a).

IT IS ORDERED that the defendant be released on his persent appearance bond pending a designation of his place of incarceration, afterwhich said defendant shall report to the designated institution or to the U.S. Marshal, San Antonio, Texas, within ninety-six hours after the clerk gives notice to his attorney.

The court orders commitment to the custody of the Attorney General and recommends, that the defendant be committed to the Federal Correctional Institution, Ft. Worth, Texas.

SIGNED BY U.S. District Judge,

William S. Session, Chief Judge.

Date, September 12, 1984.

TITLE 18, UNITED STATES CODE

SECTION 1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of per-

sonal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining or property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession

of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

TITLE 18, UNITED STATES CODE

SECTION 1952

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to per-

form any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall